IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TERRY BLACK, et al., Plaintiffs,	:	CIVIL ACTION
v.	:	
THE PREMIER COMPANY and FRANKLIN COVEY COMPANY, Defendants.	:	NO. 01-CV-4317

MEMORANDUM & ORDER

J.M. KELLY, J. **JULY , 2002**

Presently before the Court are the Motion for Summary Judgment of Defendant, Franklin Covey Company ("Franklin Covey"), and the Motion for Partial Summary Judgment of Defendant, The Premier Company ("Premier"). Plaintiffs commenced this action as a class action that alleges religious discrimination while employed by Defendants, pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17 (1994). Plaintiffs also allege conspiracy and tortious interference with contracts by Defendants.

I. BACKGROUND

Plaintiffs were employed by Premier in various sales and marketing positions throughout the country. They claim that they were either terminated or constructively discharged because they were not members of the Dutch Reform Church and their positions were filled by members of the Dutch Reform Church. As the result of a stock purchase agreement, Franklin Covey owned Premier from

March 1997 through December 2001.[1] It is undisputed that Plaintiffs Terry Black ("Black") and John Ferguson ("Ferguson") did not file complaints with the Equal Employment Opportunity Commission ("EEOC") that named Franklin Covey. It is also undisputed that Plaintiffs Patricia Nardone ("Nardone"), J. Sam Roper ("Roper"), Henry Wiley ("Wiley") and Kenneth Schepers ("Schepers") failed to file claims with the Equal Employment Opportunity Commission ("EEOC") within the appropriate 180 or 300 days of the final alleged act of discrimination.[2]

Plaintiffs Wiley, Schepers and Roper were independent representatives of School Specialties, Inc. ("School

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[1] Franklin Covey's culture is reported to be grounded in the Church of Jesus Christ of Latter Day Saints ("LDS"), see Timothy Oliver, Covey's Paradigm for Success, The Watchman Expositor, Vol. 16, No. 3 (1999), at http://www.watchman.org/lds/coveyparadigmsuccess.htm (discussing LDS roots of Franklin Covey's Seven Habits programs). Plaintiffs appear to suggest that somehow Franklin Covey and the LDS were complicit in Premier's efforts to discriminate in favor of the Dutch Reform Church. Plaintiffs, however, have not explained how this perceived connection worked or why Franklin Covey or the LDS would have a preference for members of the Dutch Reform Church.

[2] Apparently Roper, who resides in Georgia, argues he had 300 days because he was employed by Premier in Washington, where he filed what would be a timely complaint with the Washington State Human Rights Commission. Premier and Franklin Covey argue for the more restrictive 180 days applicable in a state without a state agency to investigate unlawful employment practices. As the parties have not briefed this question, the Court will not address it at this time. E.D. Pa. Loc. R. Civ. P. 7.1(c). It appears that Defendants understand that where Roper should have filed remains an open question. See Premier Reply Br. at 9 ("Depending on the proof presented, [the 180 day exclusion] would probably also exclude Roper.").

Specialties") after they were terminated by Premier. In December 2001, School Specialties purchased Premier from Franklin Covey. Premier management was placed in charge of Wiley, Schepers and Roper, who unlike other independent representatives of School Specialties, were not offered employment as salespersons with School Specialties.

There is currently a Motion for Class Certification pending in this case. That Motion has been referred to Magistrate Judge Thomas Rueter for a Report and Recommendation.

II. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This court is required, in resolving a motion for summary judgment pursuant to Rule 56, to determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In making this determination, the evidence of the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the nonmovant's favor. See id. at 255. Furthermore, while the movant bears the initial responsibility of

informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

III. DISCUSSION

A. Timeliness of EEOC Filings

The enforcement provision of Title VII requires that an injured party must file a charge with the EEOC within 180 days or, if filed with an appropriate state enforcement agency, within 300 days after the alleged unlawful employment practice occurred. See 42 U.S.C. § 2000e-5(e)(1). This filing requirement acts as a statute of limitations, barring relief for conduct which occurred outside the statutory period. See Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1387 (3d Cir. 1994). Where the claim is a class action, not every plaintiff in the class must meet either the 180 day or the 300 day requirement, as long as a member of the class has met the requirement. See Albermarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975).

Premier and Franklin Covey seek to dismiss Plaintiffs Nardone, Wiley, Roper and Schepers for their failure to timely

file their complaints with the EEOC. These Plaintiffs argue that if the class is certified and if they are members of the class, then their late filings are not an issue. As the Motion for Class Certification is pending, the Court will deny this portion of the present Motions for Summary Judgment without prejudice, pending its decision on the class certification motion.[3] The Court expects, of course, that if class certification is denied or if these Plaintiffs do not fit within the definition of the class, if the Motion is granted, that Plaintiffs will immediately withdraw any obviously time barred claims. See 28 U.S.C. § 1927; Fed. R. Civ. P. 11.

B. Parent Corporation Liability for Employment Discrimination

Franklin Covey argues that there are no cognizable claims against it, because as the owner of Premier's stock, it did not employ Plaintiffs. In a case rejecting a claim of the liability of a parent company, the Third Circuit Court of Appeals has held that a parent company can be held liable for employment discrimination at a subsidiary where the subsidiary is a mere instrumentality of the parent corporation. Marzano v. Computer Science Corp., 91 F.3d 497, 513 (3d Cir. 1996). Piercing the corporate veil in an employment discrimination case happens only

[3] Franklin Covey's Motion for Summary Judgment as to Black and Ferguson, for failure to name Franklin Covey in their EEOC complaints, fails as there is no requirement that they file an EEOC complaint if they are a member of a certified class. See Albemarle, 422 U.S. at 415 n.8.

in rare circumstances. Id. There is a four factor test to determine if a subsidiary is a mere instrumentality of its parent: (1) is there functional integration of the operations of the parent and subsidiary; (2) are labor relations centrally controlled; (3) is there common management; and (4) is there common ownership. Martin v. Safeguard Scientifics, Inc., 17 F. Supp. 2d 357, 362 (E.D. Pa. 1998).

Franklin Covey owned Premier between March 1997 and December 2001. There is also some evidence of integrated operations, such as Franklin Covey control of the Premier Board of Directors, Premier's adoption of Franklin Covey's line of training programs and Premier employees being required to attend Franklin Covey training programs. On one hand, the exacting nature of this test places a high burden upon Plaintiffs. On the other hand, this case has barely proceeded into discovery and Plaintiffs may well be able to discover evidence of common control of labor relations and common management. As one element of the four factor test has been met and there is substantial evidence of another, the Court will deny Franklin Covey's Motion for Summary Judgment without prejudice. If Plaintiffs do not discover evidence of common control of labor relations and common management, Franklin Covey may refile this Motion at the close of discovery.

To the extent that Wiley, Schepers and Roper have claims that they were not hired by Premier after it was bought by School

Specialties, they have no claim against Franklin Covey because Franklin Covey indisputably no longer owned Premier's stock. That portion of Franklin Covey's Motion is granted.

C. Conspiracy Claims

Defendants argue that Title VII's enforcement scheme effectively preempts Plaintiffs' claim of conspiracy. See Great Am. Fed. Sav. & Loan Auth. v. Novotny, 442 U.S. 366 (1979). Plaintiffs counter that conspiracy is plead in the alternative, apparently to preserve a cause of action if they are determined to not be employees of Premier, or if Franklin Covey is determined not to be an employer, as defined by Title VII. Novotny rejected a conspiracy claim asserted under 28 U.S.C. § 1985, holding that § 1985 does not create any independent right and the right asserted under Title VII was the subject of a comprehensive administrative and judicial plan. Id. at 372-77. Here, it is admitted that Plaintiffs were employed by Premier at the time that the alleged acts of discrimination took place. If Franklin Covey is determined not to be the employer of Plaintiffs,[4] then there is no independent cause of action against Franklin Covey for employment discrimination. See id.

[4] Obviously, evidence that Franklin Covey directed the adverse employment actions that Plaintiffs complain of would be substantial evidence of centrally controlled labor relations and common management, such that the question of whether Franklin Covey was the employer of Plaintiffs would need to go to the jury.

Accordingly, summary judgment is granted to Premier and Franklin Covey on the conspiracy claims of Plaintiffs.

C. Tortious Interference with Contracts

A party cannot be liable for tortious interference with a contract to which it is a party. Michelson v. Exxon Research & Eng'g Co., 808 F.2d 1005, 1107-08 (3d Cir. 1987). There is no dispute in the evidence that Premier employed Plaintiffs. Summary Judgment will therefore be granted to Premier on Plaintiffs' tortious interference claim.

In the employment context, tortious interference only applies to prospective employment contracts. Hennessy v. Santiago, 708 A.2d 1269, 1279 (Pa. Super. Ct. 1998). Here, the Plaintiffs allege and have only presented evidence that Franklin Covey interfered with their current employment. Therefore, summary judgment will be granted to Franklin Covey on Plaintiffs' tortious interference claim.

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THE PREMIER COMPANY and	:	
FRANKLIN COVEY COMPANY,	:	
Defendants.	:	NO. 01-CV-4317

O R D E R

AND NOW, this day of July, 2002, upon consideration of the Motion for Summary Judgment of Defendant, Franklin Covey Company (Doc. No. 19), and the Motion for Partial Summary Judgment of Defendant, The Premier Company (Doc. No. 20), the Responses of the Plaintiffs, the Replies thereto of the Defendants, the Affidavits and Exhibits submitted to the Court, and after Oral Argument in this matter, it is ORDERED:

1. The Motion for Summary Judgment of Defendant, Franklin Covey Company is GRANTED in part.

a. Judgment is ENTERED in favor of Defendant Franklin Covey Company and against all Plaintiffs on Plaintiffs' claims of conspiracy and tortious interference with contracts.

b. Judgment is ENTERED in favor of Defendant, Franklin Covey Company and against Plaintiffs J. Sam Roper, Henry Wiley and Kenneth Schepers as to their claims of adverse employment actions in December 2001.

2. The Motion for Summary Judgment of Defendant, Franklin

Covey Company is DENIED WITHOUT PREJUDICE, in part, as to the claims of all Plaintiffs of religious discrimination pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17 (1994), arising prior to December 2001.

3. The Motion for Summary Judgment of Defendant, The Premier Company is GRANTED in part. Judgment is ENTERED in favor of Defendant The Premier Company and against all Plaintiffs on Plaintiffs' claims of conspiracy and tortious interference with contracts.

4. The Motion for Summary Judgment of Defendant, The Premier Company is DENIED WITHOUT PREJUDICE, in part, as to the claims of Plaintiffs Patricia Nardone, J. Sam Roper, Henry Wiley and Kenneth Schepers of religious discrimination pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17 (1994).

BY THE COURT:

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JAMES McGIRR KELLY, J.